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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/568,704

02/16/2006

Karlheinz Bortlik

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29157 7590 02/12/2008  
BELL, BOYD & LLOYD LLP  
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CHICAGO, IL 60690

EXAMINER

MI, QIUWEN

ART UNIT

PAPER NUMBER

1655

NOTIFICATION DATE

DELIVERY MODE

02/12/2008

ELECTRONIC

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

PATENTS@BELLBOYD.COM

## Office Action Summary

Application No.

10/568,704

Applicant(s)

BORTLIK ET AL.

Examiner

Qiuwen Mi

Art Unit

1655

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 29 November 2007.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-12, 14 and 15 is/are pending in the application.
- 4a) Of the above claim(s) 6-8, 12, 14 and 15 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-5 and 9-11 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/ are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- ☐ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☐ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_
- ☐ Notice of Informal Patent Application
- ☐ Other: \_\_\_\_\_

### **DETAILED ACTION**

Applicant's amendment in the reply filed on 11/29/07 is acknowledged. Any rejection that is not reiterated is hereby withdrawn.

### **Claims Pending**

Claim 13 is cancelled. Claims 1-12, 14, and 15 are pending. Claims 6-8, 12, 14, and 15 are withdrawn as they are directed toward a non-elected invention group. Claims 1-5, and 9-11 are examined on the merits.

### **Claim Rejections –35 USC § 103**

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-5, and 9-11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bortlik et al (US 2002/0107292).

This rejection is maintained for reasons of record set forth in the Office Action mailed out on 8/29/2007. Applicants' arguments filed have been fully considered but they are not deemed to be persuasive.

Applicant argues that *Bortlik* fails to disclose or suggest a natural lycopene concentrate as required, in part, by the present claims. Rather, *Bortlik* teaches a lycopene concentrate having modified native characteristics by virtue of being mixed with a solvent. Specifically, *Bortlik* teaches two processes for preparing a lycopene composition, both of which require mixing the lipophilic bioactive compound with a solvent, the solvent preferably being acetone, isopropanol or ethanol (page 2, 4<sup>th</sup> paragraph). By contrast to *Bortlik*, the present claims require a "natural" lycopene concentrate, meaning that the product has only been subject to technological treatments that do not modify its native characteristics (page 2, 5<sup>th</sup> paragraph).

Applicant's argument is not found persuasive. In one of the embodiment, *Bortlik* does teach "the composition may be formed by dissolving the whey protein to form a first solution, dissolving the lipophilic bioactive compound in a solvent to form a second solution, combining the two solutions, and evaporating the solvent to form the composition as a dispersion" [0009]. Although solvent was used to enhance the solubility of lipophilic bioactive compound, it was being evaporated after the composition was formed. Therefore, the solvent does not alter native characteristics lycopene. In addition, plant extracts are being called natural products, although varieties of solvents were being used during the extraction and isolation process. Furthermore, in the specification of the current application (page 9, 4<sup>th</sup> paragraph), the tomato paste was alkalinized with a base of the NaOH type, and NaOH is definitely not "natural", and it certainly alters the native characteristics of lycopene more than a solvent which was eventually being evaporated.

Applicant's arguments have been fully considered but they are not persuasive, and therefore the rejections in the record are maintained.

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**Conclusion**

No claim is allowed.

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Qiuwen Mi whose telephone number is 571-272-5984. The examiner can normally be reached on 8 to 5.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Terry McKelvey can be reached on 571-272-0775. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Qiuwen Mi

/Patricia Leith/

Primary Examiner, Art Unit 1655

2/6/08